

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

February 18, 2009 Session

CALLEY DENISE KOPP v. MICHAEL SHANNON KOPP

Appeal from the Chancery Court for Rutherford County
No. 02-4250DR Royce Taylor, Judge

No. M2008-01146-COA-R3-CV - Filed September 14, 2009

Father appeals the trial court's denial of his petition to modify child support. Father showed that his obligation was \$109 per month based on the child support guidelines. Instead, the trial court granted an upward deviation and set Father's child support obligation at \$567.50 per month. We find that Father showed a significant variance between his current obligation and his obligation under the child support guidelines justifying a modification in the amount of his child support obligation, but we have determined that an upward deviation is also justified. We therefore reverse the judgment of the trial court and set child support at \$249 per month.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Reversed

ANDY D. BENNETT, J., delivered the opinion of the court, in which PATRICIA J. COTTRELL, P.J., M.S., and FRANK G. CLEMENT, JR., J., joined.

Stephan Walker Pate, Murfreesboro, Tennessee, for the appellant, Michael Shannon Kopp.

Phillip Macklin George, Smyrna, Tennessee, for the appellee, Calley Denise Kopp.

OPINION

Background

On August 23, 2002, Michael Shannon Kopp ("Father") and Calley Denise Kopp ("Mother") were declared divorced after eleven years of marriage. An agreed parenting plan regarding the Kopp's three minor children designated Mother as the primary residential parent and gave Mother 201 days and Father 164 days of parenting time per year. At the time of the divorce, Mother was enrolled full-time at Middle Tennessee State University and had no earned income. Father worked for Party City and earned approximately \$55,000 gross annual income in 2002 including a one-time bonus of \$13,000. Father's child support obligation was set at \$262 per week. An agreed order modifying the parenting plan was filed on July 3, 2003, changing Father's child support obligation to \$337 bi-weekly. The parties also agreed to modify the parenting schedule to allow Father more

time with the children in light of his new job at Walgreens.¹ On Father's petition, filed in October 2003, the trial court modified the parenting plan in August 2004 regarding the tax benefit assignment and set Father's bi-weekly child support at \$388. The parties participated in mediation in 2005 regarding parenting time, and another agreed modified plan was entered in March 2006. Neither Father nor Mother was represented by counsel in the 2006 modification; they agreed that Father's gross monthly income was \$2,313, that Mother's was zero, and that Father owed \$337 in bi-weekly child support. Father's petition for modification at issue in this appeal was filed on June 13, 2007, and sought a reduction in his child support obligation based on changed circumstances due to Mother's employment and in accordance with the Tennessee Child Support Guidelines. Mother's counter-petition and answer sought a modification of Father's residential parenting time.

A trial on the modification of child support was held on February 25, 2008.² The parties stipulated that Father's income at the time of trial was \$2,563.07 per month and that Mother's income was \$2,024 per month. Father testified that he worked full-time for Walgreens, working 70 hours one week and being off the next week. During his off weeks, Father would care for the children. At the time of trial, Father was paying \$730.17 per month in child support. He testified that he could no longer afford to pay that amount of child support; he and his current wife had two children of their own, and they were two months behind on their mortgage payments. According to the child support worksheet Father introduced into evidence, Father's child support obligation should have been \$109 per month. On cross-examination, Mother argued Father was willfully underemployed since he earned \$55,000 in 2002.

Mother testified that after the divorce she lived in subsidized housing and was on food stamps while she was working toward her degree. Mother graduated from MTSU in December 2006 with honors but could not find employment for about six months until she got a job with the State of Tennessee as a food stamp eligibility counselor. Mother was able to buy a home but stated that she would need to go back on food stamps if Father's child support decreased. Mother testified that Father refused to pay for feminine hygiene products while the children were in his care and did not contribute to expenses associated with their extracurricular activities. On cross-examination, Father admitted into evidence a statement of Mother's monthly expenses totaling \$2,487 per month and argued that most were for her own benefit, not the benefit of the children.

The trial court found there should be an upward deviation from the child support guidelines based on several factors, including Mother's need and Father's ability to work additional hours. After trial, the trial court set Father's child support obligation at \$567.50 per month³ and ordered he receive a monthly credit of \$67.50 until an overpayment of \$1,392 was reduced. Father filed a motion to alter or amend the judgment arguing that the child support obligation of \$567.50 was a

¹ Father worked nights, seven days on and seven days off.

² The issues of Father's child support obligation and residential parenting time were bifurcated.

³ The trial court initially misstated the amount at \$267.50 as reflected in the transcript but later corrected its order setting child support at \$567.50 per month.

grossly excessive and unjustified deviation from Tennessee’s Child Support Guidelines. The trial court denied the motion; Father appeals.

Analysis

The initial determination and later modification of a child support order is governed by Tenn. Code Ann. § 36-5-101. Tenn. Code Ann. § 36-5-101(e)(1)(A) instructs the trial court to apply the child support guidelines, as set forth in the rules and regulations of the Department of Human Services, as a rebuttable presumption in determining the amount of child support. *See* Tenn. Comp. R. & Reg. § 1240-2-4-.01 (2006). Even with the adoption of the 2005 child support guidelines, trial courts retain a certain amount of discretion in their decisions regarding child support, which decisions we review under an abuse of discretion standard. *Richardson v. Spanos*, 189 S.W.3d 720, 725 (Tenn. Ct. App. 2005). A trial court abuses its discretion when it has applied an incorrect legal standard or has reached a decision which is against logic or reasoning that caused an injustice to the party complaining. *Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001).

Upon considering a petition to modify child support, the trial court must determine whether there is a significant variance between the obligor’s current obligation and that set by the guidelines. *See* Tenn. Code Ann. § 36-5-101(g);⁴ *Kaplan v. Bugalla*, 188 S.W.3d 632, 636 (Tenn. 2006). The parent seeking to modify a child support obligation has the burden of proving that a significant variance exists. *Wine v. Wine*, 245 S.W.3d 389, 394 (Tenn. Ct. App. 2007). “[A] significant variance is defined as at least a fifteen percent (15%) change between the amount of the current support order (not including any deviation amount) and the amount of the proposed presumptive support order. . . .” Tenn. Comp. R. & Reg. § 1240-2-4-.05(2)(c). In certain circumstances, the trial court may deny the petition even if a significant variance is proven, for example, if the party opposing the modification proves the variance in child support is the result of willful or voluntary underemployment. *Richardson*, 189 S.W.3d at 727; *Demers v. Demers*, 149 S.W.3d 61, 69 (Tenn. Ct. App. 2003). The burden of proving the variance is the result of willful or voluntary underemployment is on the parent opposing the modification. *Richardson*, 189 S.W.3d at 727; *Demers*, 149 S.W.3d at 69; *see also* Tenn. Comp. R. & Regs. § 1240-2-4-.04(3)(2)(iii).⁵

⁴The statute provides in part that:

Upon application of either party, the court shall decree an increase or decrease of support when there is found to be a significant variance, as defined in the child support guidelines established by subsection (e), between the guidelines and the amount of support currently ordered, unless the variance has resulted from a previously court-ordered deviation from the guidelines and the circumstances that caused the deviation have not changed.

Tenn. Code Ann. § 36-5-101(g)(1).

⁵Tenn. Comp. R. & Regs. § 1240-2-4-.04(3)(2)(iii) lists a number of factors for the trial court to consider when making a determination of willful and voluntary underemployment or unemployment, including but not limited to a parent’s past and present employment, education, training, and ability to work.

There are additional circumstances which may justify deviating from the child support guidelines. *See* Tenn. Comp. R. & Regs. § 1240-2-4-.07. If, in its discretion, a trial court decides to deviate from the amount of support required by the guidelines, it must state in its order the basis for the deviation, the amount the child support order would have been without the deviation, and why application of the child support guidelines would be unjust or inappropriate. Tenn. Code Ann. § 36-5-101(e)(1)(A); Tenn. Comp. R. & Regs. § 1240-2-4-.07(1)(b).

In this case, Father's child support obligation under the guidelines was presumptively \$109 per month. This was based, in part, on Mother's employment and gross monthly income and the fact that Father has two additional children to support. Father met his initial burden by showing that there was a significant variance between the \$730.17 per month he was paying and the \$109 monthly amount required by the guidelines since there is an 85% difference between the amounts. The burden was on Mother to rebut the presumed obligation and show why the amount of child support should not be modified according to the guidelines. Mother argued that Father was underemployed because of his alternating work schedule. Despite the fact that Father averaged working 35 hour weeks, was considered a full-time employee by his employer, and cared for their children in his off weeks, Mother contended he could have worked additional hours in the weeks he was not working for Walgreens.

The trial court agreed with Mother that Father could work more. In ruling from the bench, the court stated that, "Mr. Kopp doesn't work 40 hours a week; he works 70 one week and none the other week. . . . I don't find that [persuasive] that he's not able to work at least 40 hours per week. I realize the schedule is considered full time at 35 hours every two weeks, but certainly his income is well below what it was at the time of the divorce." The proof did show that Father earned approximately \$55,000 in 2002 but that \$13,000 of this amount was a one-time bonus.⁶ Thereafter, the parties agreed it was best for the children and for Father that he change jobs and be allowed more parenting time. The flexible employment schedule also assisted Mother while she finished school. The trial court made no other findings with respect to Father's willful and/or voluntary underemployment.

The parties modified the parenting plan multiple times before the 2006 modification. In 2006, both parties agreed to Father's child support obligation being based on his gross monthly income of \$2,313 at the time. Father has remarried and has two children with his current wife, the first born on May 16, 2005 and the second born on November 19, 2007. Father's income has largely been consistent since 2003 and at no time before the hearing did Mother argue or claim Father was underemployed. On the other hand, Mother has gone from no earned income as a full-time student to graduating and earning a gross monthly income of \$2,204 since the 2006 modification.

Before making its judgment, the court noted a change in both Father's and Mother's incomes and in Father's circumstances with two additional children to support and Mother's need to maintain

⁶The proof also showed that Mother received 41% of the bonus as calculated under the old child support guidelines.

housing, food, and clothing for the children without government assistance. The trial court then ordered an upward deviation in child support to \$567.50, more than five times the \$109 recommended by the guidelines. In the final amended order dated March 20, 2008, the trial court did not state what amount of child support would have been ordered had the court not ordered an upward deviation. The order stated that “Mr. Kopp is presently making well below his earnings at the time of the divorce. The husband was paying a flat 41% at the time of the divorce and 41% of his current income would be approximately \$851.00 per month.” This amount was calculated under the old flat percentage guidelines instead of the current income shares model and is inapplicable here.

We find the evidence preponderates against the court’s finding that Mr. Kopp was underemployed. We further find that the order did not comply with the requirements of either Tenn. Code Ann. § 36-5-101(e)(1)(A). Father showed that a significant variance between his current obligation and his obligation under the child support guidelines justified a decrease in his child support obligation. We have concluded that the trial court made insufficient findings in order to justify such a substantial upward deviation in child support over the amount recommended by the child support guidelines, but we have also determined from the record that a deviation is warranted and in the children’s best interest.

Father’s child support obligation is modified to \$249 per month. This amount is based on proof in the record showing that Mother provided food and other necessities for the children while in Father’s care, that Mother paid most of the school supply expenses, that she would have to go back on food stamps if the child support is reduced to what Father sought, and that she has incurred fixed expenses based on the amount of support previously received. We commend Mother on her achievements in furthering her education and working her way out of poverty and recognize Father’s support of these efforts but agree with the trial court that it is important Mother maintain her status without the aid of public support. Father is still entitled to a credit of \$65 per month based on overpayments in child support resulting in current support payments of \$144 per month until the amount overpaid is credited in full. Father’s parenting time will remain the same as it has since the parties’ divorce and as noted in Father’s child support worksheet at 164 days per year. Mother’s residential parenting time will likewise continue at 201 days per year.

Conclusion

We have concluded that Father is entitled to a reduction in the amount of his child support obligation but that an upward deviation in the amount set under the child support guidelines is justified. The judgment of the trial court is, therefore, reversed and the cause is remanded for entry of a judgment setting child support in accordance with this opinion. The trial court’s award should

give Father credit for the difference between the amount he has been paying since the trial court's March 2008 order and the new amount ordered herein. Costs of appeal are assessed against the appellee, Calley Denise Kopp, for which execution may issue if necessary.

ANDY D. BENNETT, JUDGE